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No. 07-10374

In the Supreme Court of the United States

KEITH HAYWOOD,

Petitioner,

v.

CURTIS DROWN, *ET AL.*

Respondents.

On Writ of *Certiorari*
to the New York Court of Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

At the outset, two red herrings repeatedly pressed by New York's Attorney General should be set aside. First, the challenged law does not allocate *which* state court hears damages claims against state corrections employees for official conduct. The law closes *all* courts to such claims (unless brought by New York's Attorney General). *See* N.Y. Correct. Law §24(1) ("No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department . . . ."); *cf.* New York Attorney General's Brief 8 [hereinafter "NYAG Br."].

Second, whether states generally may structure their judicial systems and whether state courts must entertain federal claims "in all instances" are not at issue here. *Cf.* NYAG Br. 13-14, 22. New York chose to structure its judicial system to include courts with the power to hear tort claims generally, and claims against state employees for unlawful conduct specifically, including §1983 claims. This is not disputed. New York's Attorney General admits that the state's supreme courts may hear most §1983 claims – including even §1983 claims against state corrections employees for declaratory or injunctive relief, §1983 damages claims against corrections employees for conduct deemed outside the scope of their employment, and legal challenges to prison discipline. *Id*. at 37-38, 19 n.9.

The *actual* issue here is whether a state – after it has provided courts with jurisdiction over analogous cases – is permitted, under the rubric of specialized

jurisdictional exceptions, to reshape and avoid those specific federal claims that it considers bad policy.

To defend the state's law, New York's Attorney General must show: 1) that states may do *anything* as long as they call it jurisdiction – which he both claims and contradicts; 2) that section 24 is not contrary to federal law in purpose and effect; or that 3) the Supremacy Clause requires only that when states use jurisdictional rules to pursue targeted substantive policies contrary to Congress', the rules must apply equally to state and federal claims. This Court's teachings for more than a century, and the express provisions of the state and federal statutes at issue, preclude him from doing so. New York's attempt to protect some of its employees from suits Congress expressly authorizes is manifestly unconstitutional.

I. STATES' POWER OVER THEIR COURTS' JURISDICTION IS NOT ABSOLUTE.

A. The Precedent Relied on Recognizes Limits on State Power.

The New York Attorney General's quotations of shreds of general language out of context cannot change this Court's long-standing recognition that the Supremacy Clause limits states' exercise of their residuary sovereignty. Even the opinions he cites to support his claim of unconditional state power expressly confirm such limits, both generally and specifically with respect to state court systems.

For example, *U.S. Term Limits, Inc. v. Thornton*,

514 U.S. 779, 802 (1995), emphasizes that states retain sovereign authority "*only to the extent that the Constitution has not divested them of their original powers*" (quotation marks omitted). In concurring, Justice Kennedy stresses that "national citizenship has privileges and immunities protected from state abridgment by the force of the Constitution itself." *Id*. at 842 (Kennedy, J., concurring) (noting also that policy arguments for the state's rules are irrelevant, because the issue "is not the efficacy of those measures but whether they have a legitimate source," *id*. at 845).

Likewise, *Gregory v. Ashcroft* notes that in this country's dual sovereignty "[t]he Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause" and that even "[t]he authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit." 501 U.S. 452, 460, 463 (1991). Moreover, the Court notes that the balance tilts even further to the federal government "when Congress acts pursuant to its powers to enforce the Civil War Amendments," as it did in enacting §1983, because "[b]y its terms, the Fourteenth Amendment contemplates interference with state authority." *Id*. at 468. *Tafflin v. Levitt* also emphasizes that state sovereignty is "subject" to the "limitations imposed by the Supremacy Clause." 493 U.S. 455, 458 (1990).

No special exemption is carved out for state rules governing state judicial systems. For example, *Alden v. Maine* – although ruling that the constitutional limits on Congress' power to require federal courts to

hear particular claims also govern its power to entrust such claims to state courts – makes clear that "Congress *may* require state courts to hear . . . matters appropriate for the [federal] judicial power." 527 U.S. 706, 754 (1999) (emphasis added) (quotation marks omitted). *Alden* further notes that state sovereign immunity does not bar suits, even for money damages, against state officers in their individual capacities. *Id*. at 757.

Similarly, although New York's Attorney General quotes only the fragment of *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers* noting that states retained power over their judicial systems, the decision expressly states that such retained powers remain "restrained by 'the supreme Law of the Land' as expressed in the Constitution, laws, or treaties of the United States." 398 U.S. 281, 285 (1970); *see also Missouri ex. rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 266 U.S. 200, 209 (1924) ("No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive federal right.").

This Court has also long recognized that the Supremacy Clause limits state power over similarly innately sovereign activities. *See, e.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) (ruling that federal law may compel state agency to take certain actions "even if state law withholds from [it] the power to do so"). Only last Term, this Court ruled that a state's power over how its own money is spent is not unfettered. *Chamber of Commerce v. Brown* found such a statute invalid because it furthered policies inconsistent with Congress'. ___ U.S. ___, 128 S. Ct.

2408 (2008).

B. Further, the Absolute Power Argument Proves Too Much.

If state power over the jurisdiction of its courts were in fact absolute, this Court would not have invalidated *any* state court determinations with respect to their own jurisdiction. Yet this Court has repeatedly found such rulings invalid on the ground that the offending restrictions were contrary to the Supremacy Clause. *See, e.g.*, *Howlett v. Rose*, 496 U.S. 356, 381 (1990) (finding "no merit" in the contention that "a federal court has no power to compel a state court to entertain a claim over which the state court has no jurisdiction as a matter of state law" and ruling that Florida could not escape its constitutional obligation to enforce a §1983 claim when its jurisdictional restriction was neither uniform nor unrelated to the substance of the claim); *Testa v. Katt*, 330 U.S. 386, 389 (1947) (ruling that a state restriction on its courts' jurisdiction over a federal claim was invalid); *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934) ("The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution."); *Mondou v. New York, N.H. & H. R.R. Co.*, 223 U.S. 1 (1912) (reversing the highest state court's determination that Connecticut courts lacked jurisdiction over a federal claim); *see also Johnson v. Fankell*, 520 U.S. 911 (1997) (reconfirming the Constitution's limits on a state's power to structure its courts' jurisdiction, but upholding a state rule

that was uniformly applied to almost all cases and was outcome-neutral).

The "absolute state power" argument, therefore, "proves too much." *Richlin Sec. Serv. Co. v. Chertoff*, ___ U.S. ___, 128 S. Ct. 2007, 2018 (2008). New York's Attorney General, not surprisingly, contradicts his own argument throughout, without observing the inconsistencies. He concedes that labeling a rule jurisdictional does not permit states to avoid the obligation to enforce federal law if the rule does not reflect the type of concerns of power over the person and competence over the subject matter that neutral jurisdictional rules are designed to protect. NYAG Br. 17 (quoting *Howlett* as correctly stating the law). Just pages later, he acknowledges that "[a] state's authority over the jurisdiction of state courts is not unfettered by the federal Constitution" and that "a state cannot avoid its constitutional obligations by the simple device of removing jurisdiction from courts otherwise competent." *Id.* at 22 (quotation marks omitted). And throughout, he concedes that states have no power to decline state court jurisdiction over federal claims that are analogous to the claims they do hear. *Id*. at 10, 23, 25, 30. In addition, his entire "clear statement" argument is premised on Congress' power to override states' power to structure their judicial systems. *Id*. at 39-44.

II. THE "CLEAR STATEMENT" PRINCIPLE DOES NOT APPLY HERE.

Understandably lacking faith in the argument that states can shield their laws in a magic cloak of

invisibility from the Supremacy Clause by denominating them as jurisdictional, New York's Attorney General alternatively attempts to constrict the impact of the Supremacy Clause. One version is discussed *infra*, pp. 23-31. The other is his argument that New York can selectively withdraw jurisdiction from federal claims it finds objectionable *unless* Congress has clearly stated its intention to override this alleged "power." But the clear statement principle has no application here.

A. Congress *Has* Overridden Any State's Objections to Suits Against its Employees in State Court.

This Court has applied the clear statement principle only when it *cannot* be presumed that Congress intended to override a state's historic power. Almost entirely, the rulings involve whether Congress overrode a state's determination as to when and how it may be sued. *See, e.g., Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) (applying the principle to whether "federal law [] extend[s] the time period in which a state sovereign is amenable to suit in its own courts"); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (applying the clear statement principle to whether Congress intended to subject states to suit in their own courts); *Green v. Mansour*, 474 U.S. 64 (1985) (applying the clear statement principle to whether Congress intended to permit suits against states for notice relief); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985) (applying the clear statement principle to whether Congress intended to subject states to suit in federal courts).

When *Gregory v. Ashcroft* applied the principle outside that context – to whether a federal non-discrimination law preempted a state law establishing a qualification for state judges – it did so because Congress had provided for the law not to apply to most of a state's important public officials, which suggested that Congress' intention to reach state judges could not be presumed. 501 U.S. at 470.

Here, as New York's Attorney General acknowledges, there is a longstanding presumption that Congress has provided for state courts to hear federal claims unless Congress expressly provides for exclusive federal jurisdiction. *See, e.g.*, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) ("the Court begins with the presumption that state courts enjoy concurrent jurisdiction" over federal claims); *Tafflin*, 493 U.S. at 469-70 (Scalia, J., concurring) (because "the laws of the United States are laws in the several States, . . . [i]t [] takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction"); NYAG Br. 23, 28.

Congress is therefore presumed to have provided for state courts to hear §1983 claims. *See Will*, 491 U.S. at 66. In §1983, Congress also provided for "every person" – including state corrections employees – to be subject to actions at law or in equity for any conduct undertaken "under color of" law that violates federal law. 42 U.S.C. §1983. No other provision of §1983 suggests any ambiguity about Congress' inclusion of damages actions and state corrections employees. *Id*.

Thus, the clear statement principle does not

require Congress to specify that states may not close their courts to those parts of §1983 they find objectionable, just as it does not require Congress to specify that states may not directly immunize their employees or alter the relief available.

Requiring Congress to anticipate each and every method a state might employ to secede from the union, one rule at a time, would be to impose a "please don't eat the daisies" standard. The Supremacy Clause relieves Congress of such impossible tasks. When Congress has conferred rights, states are not free to use their ordinarily available powers to reject Congress' choices.

B. Section 24 Is Not an Exercise of New York's Historic Power to Structure its Judicial System.

New York's Attorney General is incorrect that section 24 was enacted pursuant to New York's historic power to structure its judicial system. New York acted pursuant to *that* power when it provided courts with jurisdiction over New York residents, including the parties here, and competence over tort suits. New York has even specifically provided courts with competence over all types of claims against most state employees for unlawful conduct; with competence over claims for declaratory and injunctive relief against even corrections employees for unlawful conduct; with competence over damages claims against corrections employees for unlawful conduct *if* outside the scope of their employment; and with competence over any type of claim against corrections employees for unlawful conduct if

brought by New York's Attorney General.

Thus, in structuring its judicial system, New York chose to provide courts to determine whether defendants acted wrongfully and to require them to pay damages to their victims, including state employee defendants acting within the scope of their employment. Claims about whether particular state employees violated the rights of New York residents, whether damages are due, and what amount is due, are part of these courts' ordinary docket.

The challenged state law is a targeted withdrawal of jurisdiction that New York *does* provide from specific claims New York views as ill-advised. But states have *no* historic power to second-guess that determination when Congress has made it. *See Chamber of Commerce*, 128 S. Ct. at 2417 ("the States have no [ ] authority . . . to upset the balance that Congress has struck").

Chamber of Commerce reconfirms the fundamental principle that state law based on and advancing a policy judgment inconsistent with Congress' is invalid. *Id.* at 2418. And critically, it reconfirms this key principle in the context of a type of law that *otherwise* would have fallen squarely within the state's historic power – a law governing how state-conferred grants are spent. The state law was nonetheless ruled invalid because the Court inferred a purpose and impact inconsistent with one of Congress' choices about unionization issues.

The question of whether Congress clearly stated its intention to override a historic state power,

therefore, is not presented. New York had no historic power to overrule congressional policy based on its own contrary policy and interest. That right "never existed, and the question [of] whether it has been surrendered, cannot arise." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819).

III. SECTION 24 – IN PURPOSE, TEXT, AND EFFECT – SHIELDS PRISON WORKERS FROM SUITS CONGRESS AUTHORIZES.

In the absence of state power to insulate any law denominated jurisdictional from scrutiny, or to invoke protection under the clear statement principle, it is necessary to determine whether section 24's purpose and effect conflict with federal law. *See Chamber of Commerce*, 128 S. Ct. at 2414. The statute's text, its history, the New York Attorney General's own defense of the State's policies, and his acknowledgements as to how the statute operates unequivocally demonstrate that it does conflict.

A. Section 24's Undisputed Purpose is to Protect State Corrections Employees From Specific Claims and Remedies.

Although New York's Attorney General vaguely suggests that the statute reflects only the ordinary concerns of judicial administration, he soon abandons that position to contend that New York correctly weighed the policy issues. Both arguments necessarily fail. The first is nonsensical on its face. The second is beside the point. Congress weighed these policy issues differently.

1. Section 24 cannot be explained as a law about judicial administration.

Section 24 is not codified with New York's laws governing judicial administration; it is codified with the State's substantive laws governing its corrections system – which New York's Attorney General has not denied. He also does not suggest that the state legislature's interest was *solely* in organizing its judicial system, and unrelated to the substance of the specific claims at issue. But even his suggestions that the state legislature was motivated at all by judicial administration concerns is irreconcilable with the actual statute and the judicial system New York has structured.

Section 24 does not plausibly reflect New York's alleged interest in having a special court with expertise on the subject matter decide cases requiring that expertise. *Cf.* NYAG Br. 9, 19. First, such expertise – on unlawful conduct, on personal liability for damages and amount of damages, as well as on unlawful conduct by state employees, including state corrections employees – is necessarily found in the New York's supreme courts because they have jurisdiction to hear *most* of these cases. Second, section 24 did not direct these claims to a special court. It closed its courts to all such claims, and offered a carefully-tailored state law substitute reflecting New York's weighing of the competing substantive interests, rather than Congress'.

Section 24 also was not plausibly enacted to avoid uneven geographic distribution of lawsuits in venues where prisons are located. *Cf.* NYAG Br. 19.

New York permits many prison-related suits that would be equally unevenly distributed, including challenges to prison discipline decisions. *See* N.Y. Correct. Law §24(1); NYAG Br. 36 & 19 n.9. In addition, no factual basis is offered to support this alleged "problem," and the late-asserted claim that this underlies the statute is in stark contrast to the legislative history of the statute and its predecessors, which focus on providing immunity or indemnity to state corrections employees.

Furthermore, closing all state courts to damages suits against state corrections employees for conduct within the scope of their employment is not a generally applicable rule addressing uneven distribution of cases of all kinds, which *would* be within New York's power. It is a targeted exclusion aimed at disfavored claims. Neutral solutions to this alleged judicial administrative problem might include, for example, providing more courtrooms and judges in areas with higher caseloads overall or enacting generally applicable venue or transfer rules for handling peak periods. But New York's response is far from neutral.

Finally, section 24 cannot be upheld as a neutral rule of judicial administration aimed at the "burden" of frivolous suits. *Cf.* NYAG Br. 18-19. This Court has repeatedly ruled that neutral rules for this purpose must be generally applicable, not targeted at specific categories of claims. *See, e.g.*, *Howlett*, 496 U.S. at 380 (the argument "that §1983 actions are more likely to be frivolous than are other suits . . . clearly cannot provide sufficient justification for the State's refusal to entertain such actions" (quotation

marks omitted)); *Felder v. Casey*, 487 U.S. 131, 189 (1988) (rules designed to "sift out specious claims" that apply only to state defendants are "inconsistent with the aims of the federal legislation" (quotation marks omitted)); *Burnett v. Grattan*, 468 U.S. 42, 54, 55 (1984) (rules aimed at avoiding "the diversion of state officials' attention from their duties" by an "endless stream of unfounded" suits is "manifestly inconsistent with the central objective" of §1983).

The fact that Congress has placed some restrictions on §1983 suits by prisoners also cannot help section 24. New York's Attorney General does not even attempt to argue that New York's statute simply adopts for New York the same rules that Congress adopted for federal courts. And New York has *no* power to impose entirely different and more far-reaching burdens on a federal right.

2. Section 24's purpose is to protect state prison employees and prisons.

New York's Attorney General concedes that section 24 reflects the State's "interest in sound prison administration" – a substantive interest unrelated to judicial administration. NYAG Br. 20. New York has decided that this interest is not served by permitting a right of action Congress conferred – whether brought by prisoners, visitors or corrections employees. But the contention that New York's policy is better is unavailing. *See, e.g.*, *Felder*, 487 U.S. at 143 (emphasizing that "however understandable or laudable the State's interest," it may not constitutionally displace "the goals of the federal legislation").

There is no question that New York's policy choices are different from, and in conflict with, Congress'. Congress provided state employees with *qualified* immunity from suit. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). New York's law makes state corrections employees *absolutely* immune from damages suits for official conduct in the State's courts. *See* N.Y. Correct. Law §24(1).

New York chose to offer a substitute claim instead that can be brought only against the State and is subject to various state law restrictions. *Id.*; NYAG Br. 19. Congress chose to permit claims directly against state employees in their personal capacities. 42 U.S.C. §1983. As this Court has long recognized, Congress intended §1983 not only to provide a right to compensation for violations, but also "to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *accord Richardson v. McKnight*, 521 U.S. 399, 403 (1997).

Had Congress agreed with New York that substituting states as defendants would be just as or more effective, it could have offered states the choice of immunizing their employees to the extent they were willing to consent to being sued directly. But Congress' weighing of the competing interests has not led it to provide states with that choice. As a result, the New York Attorney General's position that New York's *different* choice is just as good or

better is unavailing.[1]

Moreover, even he contradicts that contention by conceding that damages suits brought directly against individual state employees *do* have an impact, despite a state's offer to defend and indemnify them. NYAG Br. 21 (noting that damages claims can "inhibit" the conduct of employees). New York's Attorney General assumes that all such claims are frivolous and all such conduct lawful and therefore permitting these claims would inhibit only legitimate prison operations. But Congress found otherwise. The *inhibition* New York wants to avoid under any circumstances is precisely what Congress relies on to deter future violations.

The New York Attorney General is also mistaken that New York's willingness to permit most §1983 actions against state employees in its courts – and some such actions against state corrections employees – vitiates the State's hostility to the category of federal actions it shuts out. To the contrary, it only demonstrates that the State's hostility is directed to only a certain subcategory of §1983 claims rather than to all of them. New York's purpose, with respect to the claims it excludes, is

[1] His suggestion that New York's Court of Claims might accept federal claims against the State if Congress had chosen to confer a right under §1983 to sue States themselves for their employees' violations of federal rights, and that it is not New York's fault that Congress did not, NYAG Br. 35 & n.15, misunderstands the issue. New York scarcely has the power to confine Congress' choices because it thinks it has a better idea. *See, e.g.*, *Mondou*, 223 U.S. at 57.

still irreconcilable with Congress'.

Indeed, unlike California in *Chamber of Commerce*, New York does not even claim that its rule is an attempt to further Congress' goals. *Cf.* 128 S. Ct. at 2414. New York's law is aimed at its own view of "sound prison administration." Section 1983 is aimed at restraining state employees from unlawful conduct – regardless of state policies or practices – by allowing individuals to sue state employees personally.

B. It is Undisputed that Section 24's Effect is to Close New York Courts to Rights Congress Conferred.

By its terms, the "real effect" of the challenged state law is to impede Congress' purposes by selectively closing state courts to specific rights conferred in §1983. *Livadas v. Bradshaw*, 512 U.S. 107, 119 (1994). This effect is not subtle. New York has not made it less likely that claimants will succeed. It has not made it more expensive to succeed. It has locked these claimants out and padlocked the door – precisely *because* they have chosen to bring these federally-conferred claims.

New York's Attorney General does not, as he cannot, argue differently. Thus again, this case presents a much easier question than was presented in *Chamber of Commerce* because the effect of section 24 – to render state corrections employees entirely immune from §1983 damages actions for official conduct in the State's courts – is undisputed.

Instead, New York's Attorney General argues that cobbling the state's substitute claim with the remains of §1983 that New York permits is *just as good*. NYAG Br. at 36-38. The fact that Congress did not think so should end this inquiry. In any event, the burdens imposed by New York's cobbled alternative are readily identified.

In addition, New York's Attorney General appears embarrassed by the fact that section 24 also reaches suits by corrections employees (and visitors to corrections institutions, which he does not mention), because he cannot offer *any* policy argument for that. NYAG Br. 18. Nonetheless, his concession underscores that the challenged law burdens the federal rights of prison employees and visitors for, apparently, no reason at all.

1. The "permitted" claims

Any suggestion that the §1983 actions for declaratory or injunctive relief that New York permits are sufficient to fully accomplish Congress' deterrent and compensatory purposes defies centuries of experience. NYAG Br. 36-38. If actions in equity were adequate to protect against misconduct, there would be no need for actions at law. There would also have been no reason to replace separate courts of law and equity with courts that could hear claimants' injunctive and damages claims in the same proceedings.

New York's Attorney General cannot derive support from *Green v. Mansour*. *Green v. Mansour* did not suggest that injunctive relief was good

enough when Congress acted within its powers to provide a right to damages as well. It ruled that compensatory interests were not sufficient to overcome the Eleventh Amendment, which imposes *limits* on Congress' powers. 474 U.S. at 68.

The damages actions New York *does* permit against its corrections employees – those alleging conduct outside the scope of their employment and not in the discharge of their duties – are also woefully insufficient. *Cf.* NYAG Br. 37-38. Section 1983 only reaches conduct "under color of" state law. By excluding suits alleging conduct deemed within the scope of their employment and in the discharge of their duties, New York closed its courts to many, perhaps most, §1983 damages claims against these state employees – *unless* New York also classifies all conduct that violates federal law as outside that scope. It is undisputed that New York does not do so. Thus, the damages actions section 24 permits against state corrections employees are necessarily insufficient to fully accomplish Congress' goals.

2. The substitute state damages claim

New York's Attorney General admits that each of the restrictions Haywood identified is imposed by the State's substitute claim. NYAG Br. 4-5, 36-38; *see* Haywood Opening Br. 9-11. Each fosters results opposite to those Congress intended.

First, because these damages actions can be brought only against the State, NYAG Br. 4, they forfeit the deterrent effect that Congress intended the prospect of suit to have on would-be and former

violators. New York's Attorney General concedes that suing employees directly – even if the state defends and indemnifies them – can still "inhibit" their conduct. NYAG Br. 21-22.

And his counter that damages actions against states themselves "may be most effective . . . given a state's ability to prevent future violations by training and disciplining its employees," NYAG Br. 20-21, disregards precisely why Congress provided §1983 rights in the first place. States were *not* training and disciplining their employees to follow federal law; some were affirmatively resisting. *See, e.g.*, *Patsy v. Bd. of Regents*, 457 U.S. 496, 503-05 (1982). In any event, leaving compliance to the cost-benefit analysis applicable at the scale of state treasuries, reputations, and litigation obligations is far less likely to be effective than placing individuals in the line of legal fire for their own conduct.

Second, New York's 90-day notice requirement precludes many more actions, including meritorious ones, than the 3-year limitations period applicable in New York to §1983 suits. NYAG Br. 4; Haywood Opening Br. 10. This notice requirement is one month *shorter* than the notice requirement *Felder* found unconstitutionally burdensome. *See Felder*, 487 U.S. at 151 (finding that a 120-day notice requirement "so interferes with and frustrates the substantive right Congress created that, under the Supremacy Clause, it must yield to the federal interest"); *id.* at 155-56 & n.3 (White, J., concurring) (explaining the state's notice requirement).

Third, by precluding the award of attorney fees

to successful claimants available in §1983 suits, New York discourages and generally precludes most damages claims, including meritorious ones. NYAG Br. 4, 36; Haywood Opening Br. 10. Indeed, Congress provided for attorney fee awards to *facilitate* access. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("The purpose of §1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." (quoting H.R. Rep. No. 94-1558, at 1 (1976))).

New York not only precludes claimants from receiving attorney fee awards but also places them at risk of being held liable for the State's expenses and fees if their claims are deemed frivolous. *See* N.Y. Ct. Cl. Act §27 (permitting some attorney fees, including those under N.Y. C.P.L.R. 8303-a, which permits cost and fee awards if a claim is frivolous).

Fourth, by precluding punitive damages New York denies a remedy, available under §1983 to all claimants, that is aimed at appreciably increasing the deterrent effect of successful suits. NYAG Br. 4; Haywood Opening Br. 10-11.

Fifth, by precluding injunctive relief in its Court of Claims, New York burdens claimants who seek both damages and injunctive relief by requiring them to press separate actions in separate courts – suing the State for damages in New York's Court of Claims and suing the violators in a New York supreme court, in order to obtain complete relief. NYAG Br. 4, 36; Haywood Opening Br. 11.

Sixth, New York's denial of a right to jury trial

for its substitute claim – and all suits against the State – when jury trials are ordinarily available to New York claimants, is plainly intended to protect the State from liability. It therefore burdens claimants who are required to seek damages from the State itself. NYAG Br. 4, 36; Haywood Opening Br. 11. New York's Attorney General is certainly correct that states have no obligation under the Seventh Amendment to provide a right to jury trial. But New York *has* provided a right to jury trial to its litigants generally. Tort claimants have that right. Section 1983 claimants seeking damages against other state employees have that right. Section 1983 claimants seeking injunctive relief against corrections employees, or damages for conduct outside the scope of their employment, have that right. *See* N.Y. Const. art. I, §2; N.Y. C.P.L.R. 4101. New York's decision to provide that right for virtually every action *except* those seeking damages from the State evidences an expectation that judges will protect it from liability better than juries would.

These special rules narrow the remedy New York's Attorney General flogs as a just-as-good substitute for the rights Congress conferred, and thereby tilt the scale to protect the State at the expense of claimants. They demonstrate interests – and effects – inconsistent with Congress' goals of compensating and deterring unlawful official conduct by state employees.

C. The Supremacy Clause Requires More than Surgically Precise Equal Access for Federal Claims.

The New York Attorney General's contention that section 24 is constitutional because its impact on federal rights is based on state policy, not their "federal source," is wholly unsupported by this Court's jurisprudence. NYAG Br. 10, 38-39. It is urged as a special rule applicable to state jurisdictional rules, but this Court has never ruled or stated that states have *carte blanche* to selectively withdraw jurisdiction from federal claims they find objectionable so long as they tweeze out the identical subcategory of state law claims at the same time. *Cf.* NYAG Br. 32-33. States have no more power to subvert federal policy than to discriminate against federal law *because* it is not their own.

This Court has not ruled on this particular question before. However, the Court's reasoning in deciding the validity of state jurisdictional rules is irreconcilable with the New York Attorney General's contention. Indeed, the contention is irreconcilable with the fundamental tenet of Supremacy Clause jurisprudence, that states may not reject Congress' constitutionally-enacted choices because they disagree with Congress' policy. *See, e.g.*, *Chamber of Commerce*, 128 S. Ct. at 2414; *Howlett*, 496 U.S. at 371; *Mondou*, 223 U.S. at 57.

1. This Court has articulated a very different, and broader, limit.

In evaluating state jurisdiction rules, the Court

has stressed that state courts are competent to hear federal claims if they hear *analogous* cases. It has never suggested that jurisdiction over precisely identical cases is all that is required.

For example, the Alabama rule held unconstitutional in *McKnett* precluded its state courts from hearing claims by a non-resident against a foreign corporation unless the cause of action arose within the state. 292 U.S. at 231. That restriction did not discriminate between Alabama and federal claims. Alabama's courts had long lacked jurisdiction over any claims by a non-resident plaintiff against a foreign corporation that arose outside the state, but had later made an exception for claims arising under the laws of other states. *Id.*

This Court nonetheless considered the state courts' jurisdiction over "the class of actions to which that here brought belongs, in cases between litigants situated like those in the case at bar." *Id.* at 232. Because these courts had general jurisdiction of accident claims, and would have had jurisdiction if the accident had occurred in Alabama, if the defendant had been an Alabama corporation, or if the claim were brought for an injury suffered while engaged in intrastate commerce, the Court ruled that the rule could not be applied to preclude a FELA claim. *Id.* at 232-33.

The Rhode Island rule held unconstitutional in *Testa v. Katt* denied jurisdiction because the Emergency Price Control Act permitted suits for treble damages. 330 U.S. at 388. This Court found the state's jurisdictional rule unconstitutional

because state courts heard the same "type" of claim arising under state law – that is, on related subjects rather than on price control violations – and also heard federal labor law claims for double relief. *Id.* at 394. In *Testa v. Katt*, the suspect rules had been framed as applying only to claims under "foreign" laws. But Rhode Island does not appear to have permitted precisely identical claims, hence the Court's recourse to related types of claims. The Court considered the state courts' general jurisdiction over tort and other civil claims and the fact that they heard claims involving *similar* subject matter and relief.

The same understanding informs this Court's choice of which state statute of limitations period to incorporate as the federal limitations period. The Court chose the state's statute of limitations for all personal injury claims, explaining that these broadly applicable rules were chosen because of "the federal interest in ensuring that the borrowed period of limitations not discriminate against the federal civil rights remedy." *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Had the Court chosen state statutes of limitations for the identical, or even most similar, claim, states would be left with ample opportunity to discriminate as New York has here.

Furthermore, this Court has discussed at length *where* the line is properly drawn between those state jurisdictional rules that may constitutionally be applied to federal claims and those that may not. Both *Howlett* and *Johnson* defined permissible jurisdictional rules as generally applicable rules adopted to further concerns about jurisdictional

issues, not specific substantive claims.

The examples provided by *Howlett* are instructive: jurisdiction denied over out-of-state parties, events outside the geographical power of the court, and disputes for which the state is an inconvenient forum. 496 U.S. at 374-75. None involved targeted preclusions aimed at particular substantive claims.

Howlett's further clarification is definitive. *Howlett* explains that the notice requirement *Felder* invalidated would not be valid *even* if it were amended "to provide that no state court would have jurisdiction of an action in which the plaintiff failed to give the required notice." 496 U.S. at 383. The *Felder* notice requirement applied equally to state and federal claims. *Felder*, 487 U.S. at 134, 152.

Amending it to become a jurisdictional rule would have produced a far broader withdrawal of jurisdiction than New York has enacted, because it would have applied to all suits against state entities or officers. *Id*. at 134. Yet this Court explained that the "force of the Supremacy Clause is not so weak that it can be evaded" by enacting withdrawals of jurisdiction applicable to both state and federal claims to further state policies at odds with Congress'. *Howlett*, 496 U.S. at 382-83.

Johnson expressly confirmed the line drawn by *Howlett*, 520 U.S. at 918-19, and applied it. The Idaho jurisdictional rule at issue applied equally to both identical federal and state claims – and to many others – but this Court never suggested that that

alone would be sufficient to pass Supremacy Clause muster. Rather, the Court's bases for upholding the application of the Idaho rule to federal claims were that: 1) it arose solely from judicial administration concerns – the extent to which interlocutory appeals rather than final appeals were available; 2) it did not target civil rights claims against the state but was generally applicable; 3) it did not protect state entities or employees from a substantive right provided by federal law but worked, if at all, against the state's own employees by requiring them to wait longer to vindicate a valid qualified immunity claim; and 4) it would not result in different outcomes depending on whether the claim was brought in federal or state court. *Id*. at 918 & n.9, 919-21. Throughout, *Johnson* relied on *Felder*'s analysis.[2]

The same analysis demonstrates the clear invalidity of section 24. The courts' jurisdiction over virtually all similar cases is admitted. They have general jurisdiction over torts and other civil claims. They hear §1983 and similar state law claims against other state employees. They hear §1983 and similar state law claims for injunctive relief against state *corrections* employees. These courts even hear §1983 and similar state law claims for damages against state corrections employees *if* the liability at issue involves conduct deemed outside the scope of their employment. And they hear all claims against state corrections employees *if* brought by the New

[2] Contrary to New York's Attorney General, NYAG Br. 32-33, *Felder* is *not* an abandoned island in the law. Its reasoning was expressly reconfirmed by both *Howlett* and *Johnson*.

York Attorney General.

New York's courts thus have ample competence over the subject matter of damages suits against state corrections employees for unlawful conduct because they have the power to hear the same complaints about the same conduct by the same defendants *if* they had been brought by a different claimant or asked for different relief, and the power to hear every manner of related claim. Section 24 has nothing to do with neutral allocations of judicial resources; it furthers the State's policy that damages should not be available against *these* particular state employees – regardless of contrary federal law.

But the force of the Supremacy Clause, as this Court has long recognized, precludes New York from manipulating its jurisdictional rules to reshape or avoid federal laws with which it disagrees.

2. The proposed standard would eviscerate the Supremacy Clause.

Contrary to New York's Attorney General, mere neutrality between precisely identical state and federal claims would *not* be "sufficient to vindicate Supremacy Clause concerns." NYAG Br. 33. The only distinction between jurisdictional rules that could validly be applied to federal claims under the New York Attorney General's proposed standard and state rules this Court has already ruled invalid is a matter of wording.

Virtually every rule that this Court has found impermissible could be amended as a jurisdictional

rule that would pass muster under the New York Attorney General's proposed standard, but still serve precisely the same state interest, with precisely the same impact on federal rights. As *Howlett* explained, Wisconsin could achieve the same result by withdrawing jurisdiction when notice had not been provided as it achieved by imposing the notice requirement that *Felder* invalidated as applied to federal claims. *See Howlett*, 496 U.S. at 382-83.

Likewise, California could obtain the same immunity for state employees involved in parole-release decisions, the rule *Martinez* said could not constitutionally be applied to §1983 claims, by simply withdrawing jurisdiction from suits against these state employees. *See Martinez v. California*, 444 U.S. 277, 280, 284 (1980). And Pennsylvania could impose the damages rules *Monessen* ruled could not be imposed on federal claims, by withdrawing jurisdiction from claims that do not permit prejudgment interest or that seek damage awards based on future value. *See Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336, 339-40 (1988).

Each of these state rules was already framed as applying equally to all claims within the specified category. But the New York Attorney General's proposed standard would also insulate amended versions of even some state rules that were not. Under the proposed standard, for example, Rhode Island could salvage the state court ruling that was reversed by *Testa v. Katt* by amending it to withdraw jurisdiction from suits seeking treble (or penal) damages for conduct involving overcharging – or whatever broader category of claims Rhode Island

did not itself subject to such damages.

Likewise, Connecticut's objection to enforcing FELA claims contrary to state policy – ruled unconstitutional in *Mondou* – could also readily be accomplished under the proposed standard. Since Connecticut policy was to deny recovery to employees injured during employment by the negligence of fellow employees, 223 U.S. at 49-50, 57, the State could merely amend its rule to withdraw jurisdiction from all employee suits against employers alleging work injuries caused by negligence of another employee. Such a claim-specific jurisdictional exclusion would be comparable to New York's exclusion of private damages suits against state corrections employees alleging conduct within the scope of their employment and in the discharge of their duties. Under the standard urged by New York's Attorney General, Connecticut would have the power to overrule *Mondou* and prevent its courts from enforcing federal law with which it disagreed.

Thus, the standard urged by New York's Attorney General elevates form over substance. It would reduce the Supremacy Clause to a wording requirement, leaving states free to reshape and avoid federal rights at their pleasure, by embodying their policy disputes with Congress in jurisdictional terms.

This Court has never upheld constitutional standards that are so easily circumvented. And *Howlett* expressly disavowed the specific standard urged by New York's Attorney General. Rather, this Court has "often noted [that] constitutional rights would be of little value if they could be indirectly

denied." *U.S. Term Limits*, 514 U.S. at 829 (quotation marks omitted). "The Constitution nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections." *Id.* (quotation marks omitted).

U.S. Term Limits ruled a state elections procedure unconstitutional because it was "an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly." *Id.* Arkansas *had* a constitutionally recognized power to enact election procedures, but the Court explains that this power entitled it only "to adopt generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Id.* at 834 (quotation marks omitted).

Just last Term, *Chamber of Commerce* reconfirmed the longstanding principle that states "may not indirectly regulate" conduct that they "could not directly regulate." 128 S. Ct. at 2415. Notwithstanding the state's power to enact a *neutral* requirement on how its own funds can be spent, the Court found that California had imposed "a targeted negative restriction" contrary to congressional policy, which is not permissible. *Id.* New York's section 24 crosses exactly the same line, by gerrymandering its courts' jurisdiction to deny enforcement of federal claims it views as bad policy.

CONCLUSION

For the reasons stated above, the judgment and opinion of the New York Court of Appeals should be reversed.

Respectfully submitted,

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